

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
BRIEF**

75-1075

SEARCHED

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In The

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 75 CR 676

UNITED STATES OF AMERICA,

Appellee,

vs.

RALPH MARIANI,

Appellant.

Appeal from a Judgment of Conviction in the
United States District Court for the Eastern
District of New York - Sat Below:
Thomas Platt, U.S.D.J. and a Jury

BRIEF FOR APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

RALPH MARIANI,

Defendant-Appellant,

-----X

APPELLANT'S BRIEF

STATEMENT UNDER THE FEDERAL RULES
OF APPELLATE PROCEDURE

1. This case bore United States District Court, Eastern District of New York, Indictment No. 75 CR 676.
2. The parties to this action were: The United States of America v. Ralph Mariani. There has been no change in the parties.
3. This action was commenced in the United States District Court, Eastern District of New York.
4. This action was commenced by the filing of an Indictment on September 12, 1975.
5. This appeal is from a Judgment of Conviction before The Hon. Thomas Platt, and a Jury, made and entered December 12, 1975. Timely Notice of Appeal was filed.
6. This is an appeal by the Defendant-Appellant from a Judgment sentencing him to a term of 8 years.

PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court, Eastern District of New York (Platt, J.), sentencing the defendant-appellant to a term of 8 years upon a guilty verdict by a jury, of violation of Bank Robbery and Bank Robbery with a Gun under Title 18, United States Code, Section 2113(a), Section 2113(d) and Section 2.

QUESTIONS PRESENTED

The questions presented by this appeal are:

1. Whether the trial court erred in refusing to grant the appellant's motion for severance.
2. Whether the trial court erred in admitting evidence of the appellant's prior narcotics conviction for the purpose of impeachment.
3. Whether the trial court erred in admitting evidence of bullets discovered in appellant's automobile, a) without a hearing on the validity of the consent to search, b) ostensibly for impeachment of credibility, but without limiting instructions to the jury to that effect, and, c) to impeach the appellant's credibility as to matters not introduced on direct examination.
4. Whether the competent evidence presented was sufficient to sustain a verdict of guilt beyond a reasonable doubt.

STATEMENT OF FACTS

Ralph Mariani, defendant-appellant, appeals from a judgment of conviction entered on December 12, 1975, after a jury trial before the

Hon. Thomas Platt, which resulted in a guilty verdict on October 23, 1975.

On September 12, 1975, an indictment was filed in the United States District Court of the Eastern District of New York, charging that the appellant Ralph Mariani, aided and abetted Felix Acevedo in the commission of a robbery of the Chemical Bank of New York, in violation of 18 USC 2113 (a) and(d). Appellant was arraigned on September 26, 1975, and entered a plea of not guilty. Trial commenced on October 20, 1975. The appellant moved for a severance on October 20, 1975, and on October 22, 1975; at all times his motion was denied. Appellant further moved to have a prior narcotics conviction excluded. The motion was denied on the grounds that a prior conviction for possession of narcotics has a bearing on motive and that narcotics use is often associated with violent crimes such as armed robbery. The appellant excepted, objecting that possession of narcotics cannot be construed as having a direct connection with the commission of a violent crime, and that such an association is necessarily prejudicial. Defendant further moved for a hearing as to the legality of the search of his automobile conducted by the F. B. I. and the Court subsequently ruled that the hearing was not necessary because the evidence was being admitted solely to impeach defendant's credibility.

DISCUSSION OF THE EVIDENCE

After opening statements by the Government (66-71)*, Acevedo (71-75) and Mariani (75-78), the Government called its first witness, CLYDE M. FOSTER, Detective Third Grade, New York Police Depart-

* Numbers in parenthesis refer to pages n the trial transcript.

ment, Major Case Squad (84). At about 2:00 P. M. on August 25, 1975, he observed two men of Hispanic origin approach and enter a gypsy cab parked on Argyle Road, in Brooklyn (85-86). The witness followed the cab for a short time, but when they thought they were spotted (86) they proceeded directly to the vicinity of the Chemical Bank at 1600 Cortelyou Road, Brooklyn, and conferred with other members of the Major Case Squad waiting there (88). He observed the cab pass by the bank and then double park (88). One of the occupants got out of the cab, looked in the bank window and then after a brief hesitation, entered the bank (89). The cab remained double-parked outside the bank with the motor running (90) for three to five minutes (90), and then it took off quickly (91). The two men in the cab, by their hair and a wide-brimmed hat, bore a resemblance to the men seen at Argyle Road (92). After the cab left, the other man exited the bank (92) with what looked like a gun in one hand and a brown envelope in the other (93). A policeman raised his shotgun at the man and he lowered his gun and was arrested. The witness identified the co-defendant Acevedo as the one arrested (93), and as the one he observed entering the bank (94).

Upon cross-examination by Counsel for Acevedo, the witness stated that his original assignment was surveillance for the cab, which had been stolen at gunpoint (95). He was suspicious when Acevedo first entered the bank (99). He also testified that the Police Department had received a tip from an informant that that particular branch of Chemical

was going to be robbed that afternoon (112).

Upon cross-examination by Counsel for Mariani, Foster said that his first surveillance of the two men lasted five or six minutes at the most, and that he followed the cab for only two blocks (123). After the cab arrived at the bank, Acevedo remained in the car for a couple of minutes, conversing with Mariani before he got out (126). While Acevedo was in the bank, Mariani was looking at the witness's car, in a direction opposite the bank (130). The witness did not notice whether there were any parking spaces outside the bank (124).

VIVIAN ORLANDO, a teller employed by Chemical Bank, 1600 Cortelyou Road (136) said that on August 25, 1975 (137) at about 2:30 P. M. (140) she was taking care of customers when she looked up and saw a man with a gun pointed at her throat (137), standing about two feet from her. He ordered her to give him all her money (138). She took money out of her cash drawer, and put it in the large brown envelope which he gave her (138). He then walked away and she pulled the alarm (139). She stated that after the robbery, she was short \$2,398, which was the sum recovered (146).

Upon cross-examination by Counsel for Acevedo, she said that the teller next to her (155) about three feet away from her (150), also heard the defendant (155) and pulled her alarm (156). She described the gun as small, black, very worn looking, and short (162). The Court suggested that Acevedo stand for an in-court identification, but the

witness was unable to identify him (164).

DETECTIVE ANDREASEN, New York Police Department, was also on duty August 25, 1975, in the vicinity of the Chemical Bank (166). He observed a 1967 unmetered cab approach the bank, slow down, pass by and reappear a few minutes later, when it double-parked outside the bank. The person in the rear (Acevedo) got out and went into the bank, carrying a brown manila envelope (167). He exited carrying the envelope in one hand and a short barrelled revolver in the other (168). After Acevedo went into the bank, the cab remained parked for about forty-five seconds and then left quickly (169). On cross-examination he testified that when Acevedo entered the bank, he was carrying only the manila envelope (180). He also said that he'd been told by his superior officers that a registered informant told the police that the people coming out of the cab would commit a bank robbery (185-186).

Counsel for Mariani then renewed his motion for a severance previously made prior to trial, because of inconsistent defenses, arguing that Counsel for Acevedo conceded that a crime was committed by both parties and that this deprived Mariani of a fair trial and created undue prejudice (211). The court, in denying the motion (214) said that the jury was capable of determining whether Mariani did or didn't aid and abet Acevedo (213).

Continuing on cross-examination, Andreasen did not know whether there were any parking spaces in front of the bank when the

cab first passed. There was moderate pedestrian traffic (217). The witness also did not remember if there were parking spaces outside the bank the second time the car passed (219). The driver remained in the cab the whole time (220).

DETECTIVE DONALD PALMER, New York Police Department, Major Case Squad, was on duty August 25, 1975 (226). He was assigned to set up an observation of a red and white gypsy cab on Argyle Road. At about 2:00 he observed it leave the curb, driven by a man wearing a hat and occupied by one passenger (227). He then saw the cab double-parked in front of the Chemical Bank, occupied by only the driver (228). He then drove a few blocks past and positioned himself and about a minute later saw the cab travelling very quickly. He pursued the cab, which twice turned the wrong way down a one way street (229) followed by a white Volvo and the witness's car. Then the car stopped and the witness saw it double-parked, obstructing traffic. The driver was gone (230) and the witness was unable to locate him (231). During cross-examination he stated that the entire chase took about two minutes (232), and the cab was parked outside the bank for about two minutes (233).

MARLEN J. OGT, Special Agent for the Federal Bureau of Investigation interviewed Acevedo on August 25, 1975 (235). He arrested Acevedo at the police station and took him to the F. B. I.'s New York office (236). Acevedo, advised of his rights and the reason for his arrest, indicated that he understood them (237) and signed a statement

witnessed by Vogt. (237). This statement was marked for identification (238) and received into evidence with a cautionary instruction that it be used only against Acevedo (239-240). In the statement, read to the jury (240), the defendant admitted approaching a teller while carrying a .32 caliber revolver and directing her to fill a manila envelope with money (241). Upon the witness's identification of Government's Exhibits for identification 6 & 7 (243), offered previously (171), they were marked into evidence (244). The witness admitted on cross-examination that the statement was not verbatim, but was essentially a summary of what Acevedo told them (245). Acevedo also admitted to Vogt that he is a drug addict. (250).

SAMUEL M. WICHENER, Special Agent for the Federal Bureau of Investigation, went to the Chemical Bank on August 25, 1974, at about 3:00 P. M. (252), to conduct the investigation of the robbery (253). He identified Government Exhibit 8, the manila envelope, and it was received into evidence (255) against both defendants (256). The same procedure was followed with respect to Government Exhibit 6, the revolver (258). Government Exhibit 10, the receipt for the money recovered from Acevedo (258) was received in evidence (260).

MATTHEW CRONIN, Special Agent, Federal Bureau of Investigation went to 182 E. 19th Street, Brooklyn, with two New York Police Department Detectives (265) to apprehend Mariani. He was not home, but his wife let them in. They waited in the apartment from about

5:00-8:00 P.M., and then waited outside until about 11:30-12:00 P.M. (265). When he met Mrs. Mariani, he identified himself (265) and said he was looking for her husband in connection with a crime. At about 8:00 P.M., someone started to enter the house with a key, but then ran off (266). When Cronin returned to the apartment late that night, he arrested Mariani, who was taking a shower (267). Mariani was advised of his rights and taken to the New York Headquarters where he was questioned about the robbery (268). Mariani gave them signed statements, witnessed by Cronin, who was not present during the entire questioning (269). The advise of rights form and Mariani's statement was admitted into evidence with cautionary instructions that it could be used only against Mariani (271) and was read aloud (272-274). In his statement, Mariani said that on August 25, 1975, he met Acevedo, who invited him to go for a ride and asked him to drive. Acevedo directed him and told him to stop next to the Chemical Bank. Acevedo said he was going in to get some money. Mariani knew he was armed and assumed he intended to rob the bank so he panicked and left. He did not join Acevedo (273) and Acevedo did not discuss it with him (274). The witness testified on cross-examination that after they arrested Mariani, they discovered that he had intended to give himself up to the F.B.I. and that he had in his possession Agent Cronin's name and phone number (282). Mariani told Garcia, another F.B.I. agent, of his intent, but did not tell Cronin (284). They did not question Mariani in his home about the robbery (286). There

are several instances in the signed statement where Garcia, the agent who actually wrote it, paraphrased Mariani and used words not originally used by the defendant (295).

HENRY GARCIA, Special Agent, Federal Bureau of Investigation, on August 25, conducted a surveillance of Mariani's Vega (298). On cross-examination, he testified that much of his conversation with Mariani was in Spanish (299). He stated that while at Mariani's home, he did not question the defendant about the robbery (300). Much of the actual questioning was in Spanish (308) with Garcia translating, providing in several instances one of several possible English interpretations for particular Spanish words (309, 310). The final statement offered was not the complete conversation with Mariani (317). On redirect, he testified that at first, Mariani denied his presence at the bank (316).

BARRY W. MAWN, Federal Bureau of Investigation, along with another F. B. I. Agent, a firearms instructor, tested Acevedo's gun and found it operable (319).

Before the Government rested, it read a stipulation by all parties that the deposits of the Chemical Bank were insured by the F. D. I. C. (320). After the Government rested (320), Acevedo rested (326), and RALPH MARIANI appeared as his own witness.

The Appellant Mariani testified that in 1969, he was a drug addict (328), but after a conviction for possession of drugs, entered a 3-year program (329-330) and ended his addiction (328). In April, 1975,

he pleaded guilty in New York City Criminal Court (330) to possession of drugs and was fined \$100 (331), but in fact, he was not guilty and took a plea simply to end it easily (332). Regarding the events of August 25, Acevedo came up to Mariani's apartment and he asked Acevedo for a ride to his car which was parked about 15 or 20 blocks away (333). Acevedo said okay, but he first had to "cop some dope" and would take Mariani after he took care of his business (334). This was around 12:30 P.M. (334). Acevedo drove to Howard & Sutter in a gypsy cab which had been parked outside Mariani's house and Acevedo got out and said he was going to get a couple of bags of dope (335). Acevedo was gone for several minutes, probably purchasing and shooting narcotics (336). About 20 minutes later, Acevedo came out, already high and nodding. Mariani had seen people who were high on dope and was able to recognize the signs (337). Acevedo staggered to the car and was obviously in no condition to drive, so Mariani offered to do so (337). At no time did they discuss or plan the bank robbery (338). Acevedo instructed him to turn left on E. 16th Street (338), which Mariani did because it was in the direction of his car and he thought Acevedo wanted to go to a delicatessen there for something. Acevedo then told Mariani to stop and park next to the bank (339). Acevedo never told Mariani that he was going to the bank (340). After the cab stopped, Acevedo got out and reached into the car and took out a brown folder from which he took a wig and sunglasses, which he put on (341), and took a gun from under his belt and put it in

the folder (342). This was the first time Mariani saw the gun (341).

Acevedo told Mariani to wait, that he was going to get some money. He went up to the bank and looked in the window. Mariani told him "Are you crazy?" (342) and then he drove away because he thought Acevedo was planning to rob the bank and he didn't want to be involved. He was scared and he is known in the neighborhood; the bank is only four blocks from his house (343). When he left, he saw no police cars on the scene (343). He drove for a couple of blocks and the brakes failed to operate. The car skidded and he hit a car; he kept driving and turned down the wrong way into a one-way street. There were people chasing him, so he parked the car and ran off to a friend's house (344). He stayed there for four or five hours because since people in the neighborhood knew him, he thought they might be waiting for him at his home. He phoned his wife (345) who said the F. B. I. was waiting to question him about a bank robbery (346). He called her later and she said the agents would wait there all night for him. He told her he would turn himself in, but wanted to bathe and change his clothes first. She gave him the telephone number and name of Special Agent Cronin. At no time that night did he see his wife (347). He returned home about 11:30 that night, and called the number his wife had given him and spoke to an agent there. He told the agent that he was going to turn himself in and gave his name and address (348). Seconds later, the detectives arrived (349). Mariani told the agents that he was not involved in the robbery and knew nothing about it (349). Regarding the statement

he signed, he said Agent Garcia changed some things around (353) and that some of the language was in Garcia's words, not his (352). In particular, where the statement reads "panicked" he had said in Spanish that he "was scared" (353, 356). And where the statement says "assumed" he had used a Spanish word to convey the meaning "thought" (354), and "assumed" was not what he meant to say. Mariani signed the statement without reading it because he was frustrated, didn't like to read (358), and just wanted to get it over with (359), but was not forced to sign and had every opportunity to read it (358). The defendant at no time admitted that he planned or committed the robbery with Acevedo (359).

On cross-examination, Mariani testified that he was a long-standing friend of Acevedo (360) and that in August, 1975, they were both unemployed (361). He repeated that when he drove Acevedo, they were both seated in the front seat, not one in the back (377). Mariani drove toward the location of his car, but stopped once on the way, because Acevedo wanted to see a friend. The friend wasn't around so Acevedo got back in the car and Mariani proceeded down Cortelyou Road until Acevedo directed him to turn at E. 16th Street (379). Before they had originally left Mariani's house, Acevedo told him, he had just dropped some LSD and wanted to get some drugs (381).

Upon further questioning, Mariani stated that he didn't own a gun, but there was a toy gun belonging to his child in the car (394). He further stated that to his knowledge, he never had bullets in his car (395).

At a side bar conference after the defendant expressed no knowledge of the presence of the bullets, Mariani's attorney objected to the pursual of that issue as being collateral and irrelevant. The court overruled the objection saying it went to the credibility of the defendant (398). The court further ruled that upon being questioned as to whether he had ever told F. B. I. agents there were bullets in the car, if Mariani denied it, the Government could show him the bullets to refresh his memory (399).

Resuming the cross-examination, Mariani said he did not remember giving the F. B. I. agents written permission to search his car (400), and Counsel sought a side bar for an application referring to what had occurred earlier (p. 22), when the court said it would postpone a hearing on the issue of consent to search until it came up at the trial. The court denied Counsel's application, stating that it was an issue of credibility (400) and defendant's signed permission to Agent Garcia to search the car (401) was marked for identification (400). Mariani testified that he told Garcia at the time that he would find a fake gun in the car (401), but denied saying anything about bullets. The toy gun and the bullets were marked for identification (402).

In the Jury's absence, the court chastized the Assistant United States Attorney for pursuing the matter with respect to the gun, which Mariani had admitted (402). He also reiterated that admitting the bullets was solely directed at credibility and there was thus no search and seizure issue (403). This was again objected to as being too prejudicial (403).

The Government, resuming cross-examination showed the

bullets to Mariani and asked if they refreshed his memory. Mariani repeated that he only told Garcia about the gun (404), and that he didn't know the bullets were in his car. He stated that he often lends his car to friends (405).

Regarding his driving away from the bank, he said he only went down one one-way street the wrong way, that he was not driving very fast and that he was only aware of being followed after the accident (408). The defense then rested and Mariani moved for a dismissal and a directed verdict (414). The motion was denied (415).

Out of the Jury's presence, Acevedo requested permission to plead guilty to the first count of the indictment (426). In response to questioning by the Court, he admitted that he really didn't know what he was doing because he was under the influence of drugs, including LSD. He also stated that he sat in the front seat and took out a wig, sunglasses, and an envelope from which he retrieved the gun (428). The court refused to accept the plea (435) because Acevedo said he had only shown the gun to the bank teller instead of pointing it at her (429) and because he said he was high and not really aware of what he was doing (431).

All sides presented their summation. Counsel for Mariani went first (437). Acevedo's Counsel in summation admitted that he knowingly removed money from the bank (455), but denied the use of force or that the defendant threatened the teller with the gun (455). He further

stated that Acevedo would plead guilty to larceny, but not bank robbery (470). Then the Government made its summation (470) and the court charged the jury (500).

While the jury was deliberating, Counsel for Acevedo again expressed his client's desire to plead guilty to Count One to avoid the extra penalty of Count Two (551). Before accepting the plea, the Court said Acevedo would first have to give a full statement under oath (556). Acevedo spoke under oath of the events of August 25 (562-570) and stated that he was aware of what was happening, but felt that he was floating from the drugs (570). The Government opposed the plea because Acevedo did not state the facts as the Government knew them to be (575), but the court ruled that the only question being whether he committed the robbery, the statement was sufficient. Counsel for Mariani then sought to ask Acevedo a question that might exculpate his client (578) and Court refused to permit it, saying it was too late (578) and that he wanted to avoid a mistrial and might refuse Acevedo his plea if he thought that might occur (579-581). Mariani then renewed his motion for severance (583) which the court again denied, saying that the verdict as to Acevedo would be sealed (584).

The next day about 12:18 P.M., the Court received two notes from the Jury. The first requested the testimony regarding the bullets found in Mariani's car, specifically concerning their caliber (597). The Court replied that there was nothing in the testimony about their caliber.

(599).

At 12:35 P.M. (600), the court received another note from the jury asking for one bullet from Mariani's car and one bullet from Acevedo's gun (601). The court told the jury they could not have a bullet from Mariani's car because it was only for the purpose of testing defendant's credibility on cross-examination and they were not received in evidence. (602).

At 2:50 P.M. the court reread the indictment (604). After a recess (608), the jury announced it reached a verdict (608), and Mariani was found guilty of both counts (612, 613).

ARGUMENT

POINT I

IT WAS ABUSE OF DISCRETION FOR
THE TRIAL COURT TO DENY
DEFENDANT'S MOTION FOR SEVERANCE

There is a policy favoring joinder for administrative convenience. United States v. Melville, 312 F. Supp. 234 (S.D.N.Y. 1970); United States v. Wallace, 203 F. Supp. 838 (S.D.N.Y. 1967). If joinder is proper under Fed. Rules Crim. Proc. Rule 8 (b), 18 U.S.C., which permits joinder of two or more defendants "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses," the motion made under Fed. Rule Crim. Proc. Rule 14 for relief of prejudicial joinder is addressed to the Court's discretion. United States v. Falange, 426 F2d 930 (2d Cir), cert. denied 400 U.S. 906, 91 S. Ct. 149, 27 L. Ed. 2d 144

(1970); United States v. Mitchell, 372 F. Supp. 1239, 1256 (S. D. N. Y. 1973), appeal dismissed 485 F. 2d 1290 (1973). However, the requirements of a fundamentally fair trial take precedence. United States v. Kahaner, 203 F. Supp. 78 (S. D. N. Y. 1962) aff'd 317 F. 2d 459 (2d Cir.). cert. denied 375 U. S. 836, 84 S. Ct. 74, 11 L. Ed 2d 65 (1963); Opper v. United States, 348 U. S. 84, 75 S. Ct. 158, 99 L. Ed 101 (1954); and the ultimate determinative factor is whether the defendant is unduly prejudiced by the joinder. United States v. Catino, 403 F. 2d 491 (2d Cir. 1968), cert. denied 394 U. S. 1003, 89 S. Ct. 1598, 22 L. Ed 2d 780 (1969). The basis for this principle is that under our system of jurisprudence, every defendant is entitled to a fair trial, regardless of possible administrative inconvenience or expense. Adamson v. California, 332 U. S. 46, 67 S. Ct. 1672, 91 L. Ed 1903 (1947); Powell v. Alabama, 287 US 45, 43 S. Ct. 55, 77 L. Ed 158 (1932); Gideon v. Wainwright, 372 U. S. 335, 83 S. Ct. 792, 9 L. Ed 2d 799 (1963).

Undue prejudice can result where the evidence is so strong against one of the defendants that the inference of guilt may rub off on a co-defendant. United States v. Kelly, 349 F. 2d 720 (2d Cir. 1965), cert. denied 348 U. S. 947, 86 S. Ct. 1467, 16 L. Ed 2d 544 (1966). Or it may be that one defendant's defense rests heavily upon the exculpatory testimony of a co-defendant. United States v. Echeles, 352 F. 2d 892 (7th Cir. 1965). The Fifth Amendment to the Constitution of the United States guarantees a defendant the right to refuse to testify for fear of

incriminating himself. Therefore, one defendant cannot compel another to testify at their joint trial. DeLuna v. United States, 308 F. 2d 140 (5th Cir. 1962); United States v. Housing Foundations of America, Inc., 176 F 2d 665 (3rd Cir. 1949), and is thus deprived of his right to call witnesses necessary to establish his defense. Washington v. Texas, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).

In the instant case, several factors combined to result in such prejudice to warrant a finding that the trial court abused its discretion in denying defendant's motions for a severance, made both before and during trial. Firstly, severance of the two defendants would not have resulted in a great expense of time, money or judicial convenience. The entire trial, from opening statement to verdict took under four days, and much of the evidence was directed towards proving Acevedo's guilt. Thus, in the balance between the government's interest in joining the defendants in a single trial and Mariani's interest in severing his trial, minimal inconvenience would have resulted to the government by severance, while joinder created substantial prejudice for Mariani.

Additionally, the issue of fact regarding Mariani's participation being whether he knew of Acevedo's intention to rob the bank and whether he endeavored to assist him, the only witness who could shed any light was Acevedo, who did not testify at the trial itself. He did, however, testify under oath as to the facts of the robbery while the jury was

deliberating, as a condition to the Court's acceptance of his plea of guilty to the first count (551). Despite the confused nature of his testimony, certain statements corroborated elements of Mariani's defense; namely, details about entering the bank, when he put on the wig and sunglasses, and the fact that he was high on drugs at the time. When Counsel for Mariani then sought to cross-examine Acevedo, the Court refused to grant him permission to do so, and planted the suggestion that it might not accept a guilty plea from Acevedo if he attempted to exonerate Mariani.

MR. FLAMHAFT: Your honor indicated that you would permit me to ask a question of Mr. Acevedo?

THE COURT: I think you'd better not.

MR. FLAMHAFT: If the Court permits, I'd just like to ask one question of the defendant.

MR. PASSALACQUA: Your Honor, I don't think that Mr. Acevedo incriminates - said anything incriminatory against his co-defendant. I would be----

THE COURT: We deliberately---I deliberately didn't--- he deliberately didn't and I think you'd better not.

MR. FLAMHAFT: Your Honor, this defendant may be in a position to exonerate my client.

THE COURT: He may well be. But it's somewhat late for that at this point.

MR. FLAMHAFT: I haven't had the opportunity until now.

THE COURT: I'm not going to--I am going to excuse him from the witness stand. If Mr. Passalacqua wants you to-- if he lets you talk to him, that's one thing.

MR. FLAMHAFT: Okay.

THE COURT: Mr. Passalacqua is his lawyer.

MR. PASSALACQUA: Your Honor, we're going into our private chambers.

THE COURT: Before you go in there, I want to discuss one thing. Count Two is still technically open. And while I would propose ---but it can be subject to whatever position you all wish to take, to not--not to dismiss Count Two, of course, until the date of sentence. I'm just wondering whether to take the Jury verdict on it or not.

MR. PASSALACQUA: Your Honor, I assure the Court that nothing improper is going to be done here.

THE COURT: Well, Let me say this to you, Mr. Passalacqua, I have in mind Mr. Flamhaft's apparent attempt now to somehow force a mistrial and I'm going to be very careful that that does not occur. By some attempt to have this witness exonerate his client. That issue is not before the jury. The jury is going to determine the guilt or innocence

of his client on the basis of the evidence which is placed before this jury. And not on any--on any subsequent statements that are made after what has transpired here today.

MR. PASSALACQUA: First, I'd speak to my client privately. I'll ask him if he wants to speak to Mr. Flamhaft.

THE COURT: This is--I know of no precedent for taking a case at this point and reopening it and taking additional testimony, based on a plea taken at this stage of the proceeding. Nor, do I think it would necessarily be of any benefit to--I don't know whose side it would benefit. But, I am not going to do it.

MR. PASSALACQUA: Very good, Your Honor.

(MR. PASSALACQUA and Defendant ACEVEDO conferring in pen area).

THE COURT: Maybe you'd better bring Mr. Passalacqua back in.

THE CLERK: Yes, Your Honor.

(MR. PASSALACQUA and ACEVEDO present again).

THE COURT: Perhaps, I should make myself a little clearer. The rapidity with which the--Mr. Mariani's Counsel leapt to the occasion of what has transpired here makes me begin to wonder whether this isn't part

of an effort to whipsaw--this case. If there is any such suggestion here, I'm not going to accept this plea of guilty and let the Jury return it's verdict, in accordance with the due process of law and I think that maybe, in the light of what has happened, that's what I ought to do.

MRS. SCHWARTZ: I would request that Your Honor do so.

MR. PASSALACQUA: No, Your Honor.... I know now I have to defend and shield this man. And that will give him the benefit of whatever wisdom I have. It may be ridiculous things, but I think I know what I'm talking about.

THE COURT: Just bear in mind this Court is still in a position as I see it, to reject the offer of the plea.

MR. PASSALACQUA: Of course, if there is anything---

THE COURT: If there is anything which appears to me to be some sort of collusion to affect this Jury's verdict, I am going to reject it. (Transcript p. 578-581).

The implication, coercive in effect, was that Acevedo could receive an additional five years sentence if he spoke on Mariani's behalf at the trial. This resulted in a clear prejudice to Mariani and a deprivation of his basic right under the Constitution to prepare a defense and to present evidence which could exculpate him from guilt.

Courts have held that where a defendant wants his co-defendant to testify, a severance is mandated only upon a clear showing of what the co-defendant would specifically testify to and that the testimony would be exculpatory. United States v. King, 49 FRD 51 (S. D. N. Y. 1970); United States v. Caci, 401 F 2d 664 (2d Cir. 1968) cert. denied 394 U. S. 917, 89 S. Ct. 1180, 22 L. Ed 2d 450 (1969). Such a showing is impossible here, through no fault of Mariani, but because Acevedo ultimately acted in his own best interests and refused to say anything. There was evidence however, that Acevedo gave a statement to the F. B. I. implicating Mariani, but later revoked it by a subsequent statement exonerating him. The actions of the trial court in refusing to allow further questioning and the clear risk to Acevedo if he should exonerate Mariani, prevented any further indication of what Acevedo might testify to. Such tactics, if permitted, serve only to thwart justice instead of promoting it, and are thus contrary to the goals of a fair trial.

In this context, the fact that Acevedo made one statement already to the effect that Mariani was not a knowing and willing participant, coupled with the prejudice resulting from being associated in an accusatory instrument with one so obviously guilty as Acevedo and the relative ease and speed with which a separate trial could be conducted are sufficient to warrant a new trial so that evidence from Acevedo

could be obtained to the Appellant's benefit.

POINT II

IT WAS ERROR TO RECEIVE EVIDENCE
OF APPELLANT'S PRIOR NARCOTICS
CONVICTION: THE LIMITED PROBATIVE
VALUE WAS OUTWEIGHED BY THE
OVERWHELMING PREJUDICIAL EFFECT

The Appellant was charged with violating 18 USC Sec. 2113,
by aiding and abetting the co-defendant Acevedo in the robbery of a
branch of the Chemical Bank. The court before trial indicated that it
would not suppress evidence of the appellant's prior conviction for
possession of narcotics, stating the belief that this was "highly probative"
(Trial Transcript at p. 24), and reasoning that "a good portion of the
bank robbery cases that seem to come through this court have as an
underlying motive, the use of, or in some other way connected with
narcotics violations..." and that "2113D is a violent crime and so is a
narcotics charge." (p. 24).

It has become the stated rule that evidence of prior convictions
may not be admitted to show a general criminal character or a disposition
toward criminal acts. Boyd v. United States, 142 U. S. 450, 12 S. Ct. 292,
35 L. Ed 1077 (1892); Spencer v. Texas, 385 U. S. 554, 87 S. Ct. 648 ,
17 L. Ed 2d 606 (1967); United States v. Deaton, 381 F 2d 114 (2d Cir 1967).

The danger is that such evidence will prejudice the jury by
encouraging the inference that the defendant is indeed likely to have
committed the act with which he is presently charged. Michelson v.

United States, 335 U.S. 469, 69 S. Ct. 213, 93 L.Ed. 168 (1949);
United States v. Baum, 482 F. 2d 1325 (2d Cir. 1973); United States v. Vario, 482 F. 2d 1052 (2d Cir. 1973).

This principle has been codified in Fed. Rules Evid. Rule 404 (b), 28 U.S.C., which reads "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith...."

In other words, even if it were true that possession of narcotics is a violent crime, which clearly is not the case, it is impermissible to introduce evidence of a prior conviction to create an inferential link with present violent conduct.

However, past convictions may under certain circumstances be admissible to impeach the credibility of the defendant. Fed. Rules Evid. Rule 609, 28 U.S.C., permits their introduction if the conviction is less than 10 years old and is for a crime punishable by death or imprisonment in excess of one year or which involved dishonesty or false statement. But the court must always balance the probative value of such impeachment evidence against the probable prejudice that will result. United States v. Deaton, supra; United States v. Papadakis, 510 F.2d 287 (2d Cir.) cert. denied 95 S. Ct 1682 (1975). The trial court must exclude such evidence if its use will create a substantial chance of unfair prejudice, while having a minimal effect on credibility. United States v. DeAngelis, 490 F.2d 1004 (2d Cir) cert. denied 416 U.S.

956, 94 S. Ct. 1970, 40 L. Ed 2d 306 (1974).

In an attempt to achieve a fair balance between these two competing interests, courts often look at the nature of the crime for which the defendant has been previously convicted. U. S. v. DiVarco, 484 F. 2d 670 (7th Cir. 1973), cert. denied 415 U. S. 916, 94 S. Ct 1412, 39 L. Ed 2d 470 (1974). The Ninth Circuit has stated that convictions for crimes involving dishonesty, like theft, are more pertinent to credibility than convictions for crimes of violence. United States v. Hatcher, 469 F. 2d 530 (9th Cir. 1974). And in the District of Columbia Circuit, Justice Bazelon, in dissent, spoke of the lack of relevance of prior narcotics convictions to impeachment of credibility. In a case involving a defendant charged with mail theft, he stated: "The bearing of appellant's 1961 narcotics conviction on his in-court veracity is certainly less than self-evident. Contrarily, the prejudicial propensity of the conviction needs little elaboration; not only the offense itself, but the much publicized connection between narcotics use and petty larceny, could surely have inflamed the Jury against one accused of theft" United States v. McIntosh, 426 F. 2d 1231, 1236 (DDC 1970). And in a footnote, "The cases relied upon by the United States, Perry v. United States, 118 U. S. App. D. C. 360, 336 F. 2d 748 (1964) and Fletcher v. United States, 81 U. S. App. D. C. 306, 158 F. 2d 321 (1946), involved the reliability of addicts who were informants in narcotics investigations, not defendants in

in non-narcotics cases." Id. at 1236.

The New York State Court of Appeals has also spoken on the issue. Noting that "there may be undue prejudice to a defendant from unnecessary and immaterial development of previous misconduct," the court, in *People v. Sandoval* 34 N.Y. 2d 371, 378 (1974), attempted to establish clearer guidelines to help a court exercise its discretion regarding the probative value of prior convictions. It noted that certain crimes have a greater bearing on a defendant's credibility than others; the prior commission of calculated violent, vicious or immoral acts were more relevant to the defendant's veracity on the stand than other crimes of impulsive violence, or crimes caused by addiction or traffic offenses, which "seldom have any logical bearing on the defendant's credibility , veracity or honesty at the time of trial." Id. at 376, 377.

The Second Circuit seems to follow this line of reasoning. In United States v. Puco, 453 F 2d 539 (2d Cir. 1971), the court held: "First we do not believe that a narcotics conviction is particularly relevant to in-court veracity.... While there is considerable uncertainty as to what crimes, by reason of their nature, may be considered to be highly probative of lack of veracity, we believe that a narcotics conviction has little necessary bearing on the veracity of the accused as a witness." Id. at 543. The Court cited United States v. Palumbo, 401 F. 2d 270 (2d Cir. 1968) cert. denied 394 U.S. 947, 89 S. Ct. 1281.

22 L. Ed 2d 480 (1969) in which the Court indicated which factors must be considered in determining the probative and prejudicial value of such evidence: the nature of the convictions, its age, its bearing on veracity, and its propensity to influence the minds of the jurors improperly. Id at 273,

Taking these factors into account, and considering that where substantive evidence is slim, the danger of prejudice becomes magnified, the use of appellant's prior conviction was error. This circuit has held that narcotics convictions do not bear heavily on credibility, and a conviction 6 years old is remote. Furthermore, after his conviction, the appellant entered a drug detoxification program and presently is not a narcotics addict, so his prior conviction no longer has relevancy to motive for the bank robbery for which he is charged, as the court seems to suggest in its refusal to exclude the evidence. Yet a Jury could possibly find a circumstantial connection between a prior narcotics conviction and the present charge, a relationship which does not exist. A Jury could also decide that because the Appellant was convicted of possession of narcotics, he becomes by definition, an unsavory, untrustworthy, and possibly violent person from whom any unlawful activity could be expected. If the evidence overwhelmingly pointed to Appellant's guilt the prejudice wrought by this evidence would not be significant, but in this situation, it could have been the determinative factor in tipping the scales towards a verdict of guilty and for that reason becomes a

prejudicial error.

POINT III

IT WAS PREJUDICIAL ERROR TO PERMIT THE QUESTIONING OF THE APPELLANT CONCERNING BULLETS FOUND IN HIS CAR FOR THE SOLE PURPOSE OF IMPEACHMENT BUT WITHOUT THE REQUISITE LIMITING INSTRUCTIONS, AND TO PERMIT THE INTRODUCTION FOR IDENTIFICATION OF THE BULLETS THEMSELVES.

Over 60 years ago, the Supreme Court barred the use of evidence obtained through an illegal search and seizure. Weeks v. United States, 232 U.S. 383, 34 S. Ct 341, 58 L. Ed 652 (1914). The defendant has a right, upon motion and proof, to a pre-trial hearing to determine the legality of the search. Simmons v. United States, 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed 2d 1247 (1968). United States v. Pinero, 329 F. Supp. 992 (S. D. N. Y. 1971).

For a consent to a search to be voluntary, it must be unequivocal, specific, and intelligently given. United States v. Como, 340 F. 2d 891 (2d Cir. 1965). United States v. Smith, 308 F. 2d 657 (2d Cir. 1962), cert. denied 372 U.S. 906, 83 S. Ct 717, 9 L. Ed 2d 716 (1963). The burden of proving free and voluntary consent is on the government. Bumper v. North Carolina, 391 U.S. 543, 88 S. Ct. 1788, 20 L. Ed 2d 797 (1968). If the consent was freely and voluntarily given, there has been no violation of the defendant's constitutional rights and the evidence obtained may be used by the government as part of its direct

case. United States v. Callahan, 439 F. 2d 852 (2d Cir. 1971). However, if the consent was not freely and voluntarily given, the resulting evidence and leads obtained therefrom may not be used to affirmatively prove the defendant's guilt. Weeks v. United States, supra; Silverhorne Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319.

Courts have attempted to delineate certain factors relevant to the issue of whether the consent was valid, but these factors are merely guidelines and the presence of some of them is not controlling for each case "must stand or fall on its own special facts." United States v. Dornblut, 261 F. 2d 949 (2d Cir. 1959). A court will examine all of the surrounding circumstances in each particular case and then make its determination. Schneckloth v. Bustamonte, 412 U.S. 219, 93 S.Ct. 2041; 36 L.Ed 2d 854 (1973). Among those factors to be considered are whether the defendant was in custody at the time. United States v. McCunn, 40 F. 2d Supp 295 (S.D.N.Y. 1930), whether the consent was coerced "by explicit means by implied threat or covert force," Schneckloth v. Bustamonte, supra, 412 U.S. at 228 and whether the defendant was aware at the time of his right to refuse consent. State v. Johnson, 18 Cr. L. 2097, New Jersey Supreme Court 10/8/75.

Thus, the mere fact that the appellant signed a waiver is not sufficient to prove that his consent to the search was freely, knowingly and voluntarily given where there is some question surrounding the

circumstances of the signing, and the appellant was entitled to a hearing on that issue.

The trial court, in entertaining pre-trial motions, refused to permit a hearing on the issue of the voluntariness of defendant's consent to the search of his automobile. (Transcript at 22). Determination was postponed until such time as the government might seek to use the evidence obtained thereby. However, at that point in the cross-examination, the Court again refused to allow the Appellant his hearing, stating that since the evidence was being introduced solely to impeach his credibility, no hearing was necessary (Transcript at 403).

If the evidence was nominally admitted for the very limited purpose, it was not regarded as such by the Jury in its deliberations. The Jury indicated by its written questions that it considered the operable bullets found in appellant's car to be significant in and of themselves, and not just as a factor in measuring credibility, thus weighing the evidence as if it were evidence in chief adduced by the government in its direct case. The appellant was thereby irreparably prejudiced by the admission of evidence without the benefit of a hearing to establish whether his consent to the search was knowing and voluntary.

Nor was the Court correct in permitting the evidence to be introduced for even the limited purpose of impeachment of credibility. In a series of cases, the Supreme Court expounded the view that evidence which is inadmissible because it was obtained through a violation of some

constitutional right, may yet be used upon cross-examination to impeach a defendant's credibility with respect to his direct testimony. However, there must be a logical connection between the nature of the direct testimony and the evidence used to cross-examine the defendant. In Agnello v. United States, 269 U.S. 20, 70 L. Ed 145, 46 S. Ct 4 (1925) the defendant was charged with sale of narcotics. A can of cocaine found in his bedroom was excluded as evidence in chief because the search was unlawfully conducted without a warrant. In his direct testimony, the defendant stated that he had received packages from the co-defendant, but did not know that they contained narcotics. He did not testify at all concerning the can of cocaine. On cross-examination, he was asked if he had ever seen narcotics. Upon his expected denial, the seized drugs were now permitted to be entered into evidence. The Court reversed his conviction on the ground that the evidence was improperly admitted even for the limited purpose of impeachment, because the defendant did not testify to anything on direct which could be contradicted by the finding of cocaine. "He did nothing to waive his constitutional protections or to justify cross-examination in respect to the evidence claimed to have been obtained by the search" Id. at 35.

The Court distinguished Agnello on its facts, in Walder v. United States, 347 U.S. 62, 98 L. Ed 503, 74 S. Ct. 354 (1954). In a previous indictment, evidence obtained through an unlawful search and

seizure was suppressed and the charge against the defendant dismissed. In a later proceeding for other narcotics transactions, the defendant testified on direct examination that he never possessed narcotics. On cross-examination, the Government was permitted to introduce testimony from one of the officers who had participated in the previous unlawful search and from the chemist who had analyzed the seized drugs. The Court held that the admission of this evidence was constitutionally permissible.

"It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage and provide him with a shield against contradictions of his untruths....

Take the present situation. Of his own accord, the defendant went beyond a mere denial of complicity in the crimes of which he was charged and made the sweeping claim that he had never dealt in or possessed any narcotics. Of course, the Constitution guarantees a defendant the fullest opportunity to meet the accusation against him. He must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce evidence illegally secured by it and therefore not available for its case in chief. Beyond that, however, there is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility." *Id* at 65. (Emphasis supplied).

The Court then distinguished Agnello on the grounds that there the Government deliberately sought to elicit perjurious testimony from the defendant on cross-examination concerning something not

brought out on direct. The Government was thwarted not because it attempted to use evidence to impeach the witness, but because of its tactics whereby it first introduced on cross-examination a subject not touched on direct and then sought to impeach the defendant's credibility *Id.* at 66.

In the instant case, the Government erroneously relied at trial on Harris v. New York, 401 U.S. 22, 91 S. Ct. 643, 28 L. Ed 1 (1971), which relied on the holding in Walder to permit the introduction of prior inconsistent statements, inadmissible as direct evidence under Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed 2d 694 (1966), for the purpose of impeaching the defendant's credibility. In Harris, the defendant was charged with twice selling heroin to an undercover police officer. In his direct testimony, he denied one of the charges and admitted the fact of the other sale, but not that the substance sold was heroin. A prior statement, made by the defendant before he was informed of his Miranda rights and contradicting his testimony on direct, was admitted with instructions to the Jury that it related solely to the issue of credibility and was not to be regarded as evidence of guilt. This decision has opened the way for the general use of statements obtained without prior Miranda warnings and evidence seized in unlawful searches, but for the limited purpose of impeaching the defendant on cross-examination as to matters which he himself introduced on direct.

The California Supreme Court recently reached a similar conclusion in its decision in People v. Taylor, 194 Cal. Rpt. 350, 501 P.2d 918 (1972) cert. denied 414 U.S. 863, 94 S. Ct. 35, 38 L. Ed 2d 83 (1973). The defendant and a passenger were stopped for a traffic infraction, while driving on a state highway. After a routine check revealed that the automobile was stolen, both persons were arrested. The subsequent search of the car turned up heroin and amphetamines. Both defendants were charged with possession of these drugs.

In a limited direct testimony, the defendant denied that the specific items found in the car belonged to him. Upon cross-examination, the defendant was asked if he was ever arrested with a balloon of heroin in his possession. The defendant responded that he had once previously been subjected to an illegal stop and frisk whereby the police officer reached his hand into defendant's pocket and pulled out a balloon with heroin. Defendant further testified that he had not put the balloon in his own pocket. The Government was then permitted to call the police officer as a witness to rebut the defendant's testimony.

The Court analyzed the constitutional implications of such actions and concluded that:

"When carefully read in the light of their facts, Agnello and Walder thus stand for the proposition that in narcotics cases evidence of prior possession of contraband by the defendant that was obtained by means of an illegal search and seizure is admissible for the limited

purpose of impeaching the defendant as a witness only if, on his direct examination, he makes a sweeping claim that he has never dealt in or possessed any narcotics; the evidence is not admissible for any purpose if the defendant merely denies committing the crime charged and it is the prosecutor who, on cross-examination elicits an expected denial of his equally sweeping question asking if the defendant has ever engaged in narcotics activity before." Id. 501 P2d at 923 (Emphasis Supplied).

The Court also noted that Harris involved a similar situation, where the evidence was offered to impeach statements of the defendant on direct testimony,

"We conclude, for the reasons stated in Agnello and the explanation of that decision in Walder, that it was error of constitutional dimension to allow the prosecution to inquire whether defendant had ever been arrested with a balloon of heroin in his possession, and to prove the fact over defendant's denial by the introduction of Sergeant McCormick's testimony." Id. 501 P 2d at 925.

In the case at bar, the inquiry on cross-examination and the introduction of the bullets were not directed towards any testimony made by the defendant on direct. The Government broached the subject, and when the defendant testified that he was not aware of the existence of any bullets in his car, the Government was permitted to impeach him. This is more than a mere interpretation of the Harris doctrine; in substance it impermissibly extends Harris so as to rob the exclusionary rule of all effect, for under this interpretation, the Government may smuggle in as an "impeachment" device, all evidence which would be inadmissible as evidence-in-chief, regardless of whether the defendant

has testified as to that matter on direct or not, thereby avoiding the principle enunciated in Agnello. The implications of such an extension are grave, for while the evidence may be admitted only with specific instructions informing the Jury of its proper use, the idea that juries can consider evidence for one purpose only and disregard it for all others "all practicing lawyers know to be unmitigated fiction."

Kulewitch v. United States, 336 U.S. 440, 443, 69 S. Ct., 716, 93 L. Ed. 790 (1949) (concurring opinion, Jackson, J.). Thus all evidence which was obtained in violation of a defendant's constitutional rights will effectively be considered as direct evidence bearing on the defendant's guilt.

But assuming arguendo that the evidence was properly admitted for the very restricted purpose of impeachment the trial court nevertheless committed a prejudicial and reversal error by failing to so charge the jury. During the trial itself, the Court gave no instructions to the jury regarding impeachment of credibility and the proper use of such evidence. In its charge to the jury, the court again omitted any reference and failed to draw any distinction between using the evidence of the bullets as impeachment evidence and using it as substantive evidence directed at the issue of defendant's participation in the robbery. During its deliberations, the jury sent a note requesting "testimony regarding the bullets in Mariani's Vega. Specifically, in regard to their caliber (Record at 597). The Court's response was

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simply : "There is nothing in that portion of the testimony with respect to the caliber of the bullets." (Record, at 599). Again, no cautionary instructions to the Jury, no explanation of the difference between using the evidence substantively and using it for impeachment, no comment that the Jury may not consider the caliber of the bullets and that any inferences drawn from their presence in defendant's car were impermissible. A few minutes later, the Jury sent another note, requesting to see one of the bullets from Mariani's car and one of the bullets taken from Acevedo's gun, obviously drawing an inferential link between the two. The Court's reply was brief, "You may not (have one of the bullets from Mariani's Vega) because the bullets were not marked into evidence. They were used for the purpose of testing the credibility of Mr. Mariani on cross-examination and for that limited purpose only. I will not try to paraphrase what Mr. Mariani said with respect to the bullets, but they were not admitted into evidence so you may not have them. They are not exhibits." (Record, 602 -603).

Our Courts have consistently held that evidence admitted for the sole purpose of impeachment cannot be used substantively.

Bridge v. Wixon, 326 U. S. 135 65 S. Ct. 1443, 89 L. Ed 2103 (1945).

Drawing such a distinction is difficult under normal circumstances, but when the Jury does not even know that it is required to do so, the supposition that it will anyway becomes absurd. Juries must be informed of the limited purpose for which impeachment evidence has been

admitted, in order that they afford the defendant a fair trial and verdict.

United States v. Partin, 493 F.2d 750 (5th Cir. 1974). United States v.

Dye, 508 F. 2d 1226 (6th Cir. 1974), cert. denied 95 S. Ct. 1395 (1975).

The failure of the Court to give limiting instructions may be reversible prejudicial error. United States v. Barnes, 319 F. 2d 290 (6th Cir. 1963);

United States v. Lipscomb, 425 F.2d 226 (6th Cir. 1970). Certainly in this jurisdiction, which adheres to a "harmless error" rule, it cannot be said that the court's error did not prejudice the defendant or adversely affect his interests. The issue, as stated by the Supreme Court in Fahy

v. Connecticut, 375 U.S. 85, 86-87, 84 S. Ct. 229, 11 L. Ed 2d 171 (1963), is "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." (Emphasis supplied). In

Chapman v. California 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed 2d 705 (1967), the Court again spoke about the concept of harmless error. "An error in admitting plainly relevant evidence which possibly influenced the Jury adversely to a litigant cannot, under Fahy, be conceived of as harmless. Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments casts on someone other than the person prejudiced by it a burden to show that it was harmless." Id. at 24.

In this case, both the tenor of the notes and their timing indicate how strongly the jury was influenced by the evidence of the bullets and what significance it attached to them. The Jury had been deliberating from 1:10 P. M. until 5:20 P. M. on the previous day, and

resumed its deliberation at 10:00 A. M. The Jury notes were received at 12:18 P. M. and at 12:35 P. M. After a luncheon recess from 1:00-2:00 P. M., the Jury deliberated until it announced a verdict sometime around 3:30 P. M. The proximity of the Jury's requests to its verdict indicate that the bullets may have made a strong impression. For, if the Jury could infer that Mariani knew of Acevedo's plan to rob the bank and went so far as to furnish bullets for the exploit, they could then clearly find the defendant guilty of aiding and abetting. And where other supporting evidence is weak, this evidence becomes extremely damaging.

The burden of proof is on the Government to show that the error was not substantial and did not "contribute to the verdict obtained." For the Court has held that "Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Chapman v. California, supra. And, if the Government does not meet that burden, the conviction must be reversed.

POINT IV

THE EVIDENCE ADDUCED WAS
INSUFFICIENT TO SUSTAIN A
FINDING OF GUILT BEYOND
A REASONABLE DOUBT

In a fair prosecution, all the separate elements of the offense charged must be proven beyond a reasonable doubt. Christoffel v. United States, 338 U.S. 84, 69 S. Ct. 1447, 93 L. Ed 1826 (1948).

If any element is not proven the conviction cannot stand.

"Reasonable doubt" is such doubt as would cause prudent men to hesitate before acting in matters of importance to themselves.

United States v. Chas. Pfizer & Co., Inc., 367 F. Supp 91 (S. D. N. Y. 1973); United States v. Johnson 343 F 2d 5, (2d Cir. 1965). Evidence which merely raises a suspicion of guilt is not sufficient to meet that requirement. United States v. Quinn, 141 F. Supp 622 (S. D. N. Y. 1957). And the requirement of proof beyond a reasonable doubt operates on the case as a whole United States v. Moia, 251 F. 2d 255 (2d Cir. 1958)

To convict a defendant of the crime of bank robbery, the government must prove beyond a reasonable doubt, a taking or attempt to take something of value from an institution defined in the statute, by force and violence or by intimidation. 18 U. S. C. Sec. 2113.

Bank robbery under the statute is an intentional crime, requiring a specific criminal intent. Smith v. United States, 356 F 2d 858 (8th Cir. 1966) cert. denied 385 U. S. 820, 87 S. Ct. 44, 17 L. Ed 2d 58. (1966). United States v. Crimmins, 123 F 2d 271 (2d Cir. 1941).

As against one charged with aiding and abetting under this statute it must be proven that the accused "in some sort associate(d) himself with the venture, that he participate(d) in it as in something that he wishes to bring about, that he seek by his action to make it succeed."

United States v. Peoni, 100 F. 2d 401, 402 (2d Cir. 1938). Thus intent, knowledge and overt act, are required of the aider and abettor

just as they are of the principal. See 18 U.S.C. Sec. 2. Nye & Nissen v. United States, 336 U.S. 613, 69 S. Ct. 766, 93L. Ed 919 (1949). United States v. Dickerson, 508 F. 2d 1216 (2d Cir. 1975).

While it is recognized that this knowledge and intent need not be proven directly, but may be shown by circumstantial evidence, guilt may not be inferred from mere presence at the scene of the crime.

United States v. Williams, 341 U.S. 58, 71 S. Ct. 595, 95 L. Ed 747 (1959).

United States v. Minieri, 303 F. 2d 550 (2d Cir.) (1962), cert. denied 371 U.S. 847, 83 S. Ct. 79, 9 L. Ed 2d 81 (1962). Nor is presence coupled with knowledge that a crime is being committed sufficient to permit an inference of criminal intent. United States v. Garguilo, 310 F. 2d 249, (2d Cir. 1962). United States v. Fantuzzi, 463 F 2d 683 (2d Cir. 1972).

Looking at the facts in the light most favorable to the government, there is not sufficient evidence to support a finding of guilt. The government's witnesses testified that a man fitting Mariani's description drove Acevedo to the bank, Acevedo sitting in the rear seat of the gypsy cab wearing an Afro wig. There was testimony that Mariani circled the block before parking outside the bank. Between 45 seconds and 2 minutes after Acevedo disembarked, Mariani drove quickly off driving erratically for several blocks until he abandoned the car and ran away. Nine hours later, he was apprehended when he returned to his

home. In his possession was the name and telephone number of the F. B. I. Agent assigned to the case. Mariani signed a confession admitting that he drove the cab and that when Acevedo entered the bank, he had an idea it might be for the purpose of robbing it, and that he drove off because he did not want to get into any trouble. But there was no evidence presented to permit an inference that he knowingly and intentionally assisted in the planning or execution of the crime, and no evidence to contradict Mariani lack of advance knowledge and intent.

There has been created only a suspicion of guilty knowledge
has
and intent on the part of the defendant. The government/clearly proven that the defendant was the driver of the gypsy cab parked outside the bank, but it has not offered any proof that he knew that Acevedo was planning to rob the bank or that he himself intended to aid and abet Acevedo in the robbery.

An examination of other decisions regarding the sufficiency of evidence in bank robbery cases helps to illuminate the problem of how much circumstantial evidence is adequate to support a finding of guilt.

Circumstantial evidence was held to be sufficient in White v. United States, 330 F. 2d 993 (5th Cir. 1964). The defendant in that case wrote a statement saying in part: "I didn't tell him specifically to go ahead and burglarize the places, but he could tell by my actions that I assented to go along with them" Id. at 994.

In United States v. Miller, 478 F 2d 1315 (2d Cir. 1973) the testimony of two co-conspirators provided sufficient reason for the jury to believe that the appellant participated in the planning of the crime, drove the principal conspirator to the scene of the robbery, protected the bank entrance, assisted in the escape, and shared in the division of the purse.

Testimony putting the defendant present on two occasions when plans for the robbery were being discussed and alleging that the defendant agreed to and did steal the getaway car, was held to be sufficient to support a conviction in United States v. Johnson, 462 F 2d 608 (8th Cir. 1972).

In United States v. Cady, 495 F 2d, 742, (8th Cir. 1974) defendant was the driver of the getaway car. One co-conspirator testified that the defendant was part of the conspiracy, that he knew what was going on and agreed to furnish the car for the robbery, and that he received \$1,500 for his assistance. The other co-conspirator said that the defendant did not know what was going on and was not paid any money. A used-car salesman's strong testimony that, when Cady obtained the car from him, he implied a sinister purpose and a time requirement which corresponded to the time of the robbery, corroborated the first robber and allowed a finding of guilt.

Evidence was held to be insufficient when the only proof offered against one charged with aiding and abetting was that the

defendant borrowed a car similar to the one used in the robbery, keeping it for the time period of the robbery and that suitcases containing money wrappers and other circumstantial evidence were found in his mother's home, evidence far stronger than against the appellant. United States v. Garrett, 371 F. 2d 296 (7th Cir., 1966).

The Second Circuit has held that to convict a defendant of conspiracy to rob a bank, it is necessary to prove more than knowledge that his co-conspirators were going to break a law; he had to know that they were going to rob the bank. United States v. Gallishaw, 428 F. 2d 760 (2d Cir., 1970). Without proof of that requisite intent, the conviction could not be affirmed.

Through the insufficiency of limiting instructions, the Jury was allowed to regard the fact that bullets were found in defendant's personal automobile as substantive evidence linking him to the commission of the offense. However, such an influence is impermissible since there was no proof linking those bullets to the gun used by Acevedo and there was no proof that the bullets in fact belonged to Mariani or that he knew of their presence in his automobile. Furthermore, the evidence was introduced solely to impeach Mariani's credibility and could not legally have been used to provide an inferential link between the appellant and Acevedo. Yet, this was the only possible evidence permitting the inference that Mariani knowingly aided and abetted Acevedo

in the robbery. The proof adduced was insufficient as a matter of law to permit a guilty verdict.

CONCLUSION

THE JUDGMENT OF CONVICTION
SHOULD BE REVERSED AND THE
INDICTMENT DISMISSED, OR IN
THE ALTERNATIVE, THE APPELLANT
SHOULD BE GRANTED A NEW TRIAL.

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Respectfully submitted,

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